

Before the
Commission on Common Ownership Communities
for Montgomery County, Maryland
November 13, 2002

In the Matter of	:	
POTOMAC GLEN SOUTH	:	
HOMEOWNERS ASSOCIATION, INC.	:	
Complainant,	:	Case No. 546-G
	:	
vs.	:	
	:	
KRISHAN MUTREJA	:	
RITA MUTREJA	:	
Respondent.	:	

DECISION AND ORDER

The above-entitled case, having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing, on November 13, 2002, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12, and 10B-13 of the Montgomery County Code, 1994, as amended.

The duly appointed hearing Panel having considered the testimony and evidence of record, finds, determines and orders as follows:

On November 14, 2001, the Potomac Glen South Homeowners Association, Inc. (hereinafter the "Complainant" or "Association") filed a formal dispute with the Office of Common Ownership Communities against Krishan Mutreja and Rita Mutreja (hereinafter the "Respondents"). The Complainant alleged that the Respondents are violating the Association covenants by conducting a family day-care business out of their home within the Association. The Respondents admit to running a family day care business out of their home within the Association but contend that the Association lacked authority under the covenants to prohibit such activity.

Inasmuch as the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities. The Commission voted that it was a matter within the Commission's jurisdiction and the above hearing date was scheduled.

Findings of Fact

Based on the testimony and evidence of record, the Panel makes the following findings:

1. Krishan Mutreja and Rita Mutreja are the record owners of a lot within the Potomac Glen South Homeowners Association, Inc., ("Association"). The lot is

more specifically described as 13101 Piney Knoll Lane, Potomac, Maryland 20854 ("Lot").

2. The Association was created by Articles of Incorporation and a Declaration of Covenants, Conditions and Restrictions ("Declaration") which was recorded among the land records of Montgomery County, Maryland and which encumbers and binds the Respondent's Lot and other lots and common parcels.
3. Article VII, Section 10 of the Declaration is the dispositive section of the covenants regarding this dispute and it provides as follows:

Section 10. Family Day Care. The use of any dwelling unit within the Property as a "family day care home", as defined in §11B-111.1 of the Maryland Homeowners Association Act, as amended (the "Act") is hereby expressly prohibited. This express prohibition may be eliminated by approval of a simple majority of the owners eligible to vote pursuant to the voting procedures set forth in the By-Laws. In the event that the express prohibition is eliminated pursuant as set forth in the preceding sentence, then the Board of Directors and the Covenants Committee may promulgate any such requirements thereon as deemed necessary and any such family day care home shall comply with all applicable State and Montgomery County laws and regulations.

4. Section 11B-111.1(d) of the Maryland Homeowners Association Act ("Act") provides, *inter alia*, as follows:

(1) (i) Except as provided in subparagraph (ii) of this paragraph and subject to the provisions of paragraphs (2) and (3) of this subsection, a homeowners association may include in its declaration, bylaws, or recorded covenants and restrictions a provision expressly prohibiting the use of a residence as a family day care home or no-impact home-based business.

(2) A provision described under paragraph (1) (i) of this subsection expressly prohibiting the use of a residence as a family day care home or no-impact home-based business may not be enforced unless it is approved by a simple majority of the total eligible voters of the homeowners association, not including the developer, under the voting procedures contained in the declaration or bylaws of the homeowners association.

(4) If a homeowners association includes in its declaration, bylaws, or recorded covenants and restrictions a provision expressly prohibiting the use of a residence as a family day care home or no-impact home-based business, the prohibition may be eliminated and family day care or no-impact home-based business activities may be permitted by the approval of a simple majority of the total eligible voters of the homeowners association under the voting procedures contained in the declaration or bylaws of the homeowners association.

5. As set forth in §11B-111.1 above, family day care homes may be prohibited if the Declaration contains a prohibition and, pursuant to §11B-111.1(d) (2), a simple majority of the owners approve of the enforcement of the covenant prohibition. Further, pursuant to §11B-111.1(d) (3), that even with such an approval, a simple majority of the eligible voters may decide to eliminate the prohibition.
6. Respondents admit that they are presently, and have been since the time this matter was instituted by the Association, running a family day care home ("day care") as that term is defined in §11B-111.1 of the Act. Respondents presented testimony that in August 2001 they were able to obtain, by petition, the approval of their day care home by five (5) of the eight (8) owners within the Association.
7. The Association presented testimony that the Board of Directors of the Association did not accept the results of the "petition" of the Respondents mentioned above. Further, that to formalize the matter the Board conducted a "confidential" vote of the membership by letter dated August 29, 2001 and that of the eight (8) homes in the Association, five (5) owners voted "Against Operation of a Family Day Care Home" and three (3) voted "For Operation of a Family Day Care Home".
8. Neither the Respondents nor the Association presented sufficient evidence that either the "petition" or the "confidential vote" were accompanied by proper notice to all owners or that the "votes" were appropriate under the Association Declaration or Bylaws.
9. The parties did, as a result of mediation, agree to submit the matter to a third vote of the membership and, accordingly, in July of 2002, another vote was held and the outcome was four (4) votes in favor and four (4) against the enforcement of the prohibition against the Respondent's day care.

Conclusions of Law

Pursuant to the provisions of Article VII, Section 10 of the Declaration and §11B-111.1 of the Act, the Association can vote to enforce a Declaration prohibition against the operation of family day care homes provided a simple majority of the eligible votes in the Association approves of such enforcement.

As a result of the July 2002 tie-vote, a simple majority has failed to approve enforcement of the prohibition against day care found in Article VII, Section 10 of the Declaration.

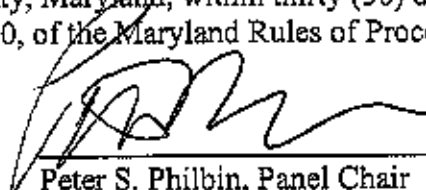
Until a simple majority of the voting interests (the owners of five of the eight lots assuming all are "eligible") vote to enforce the prohibition found in Article VII, Section 10 of the Declaration, the Respondents may continue to operate their day care business subject to the restrictions found in §11B-111.1 of the Act.

Order

In view of the foregoing, and based on the evidence of record, it is, on this ²⁸~~26~~ day of January, 2003, hereby Ordered by the Commission Panel that the above-styled proceeding be dismissed with each party bearing its own respective costs and expenses.

The foregoing was concurred in by panel members Philbin and Weiss with Wertlieb dissenting.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to Title 7, Chapter 200, of the Maryland Rules of Procedure.



Peter S. Philbin, Panel Chair
Commission on Common
Ownership Communities